



**ILLINOIS STATE
BAR ASSOCIATION™**

Illinois Bar Journal

April 2016 • Volume 104 • Number 4 • Page 22

The Magazine of Illinois Lawyers

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Criminal Law

Are We Making Murderers? False Confessions and Coercive Interrogation

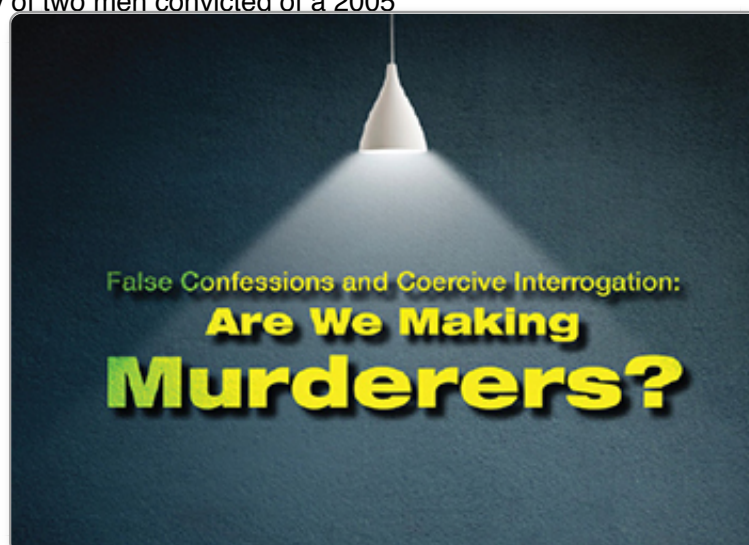
By Ed Finkel

It's no secret that criminal suspects in Illinois and elsewhere confess to crimes they didn't commit, often after aggressive police interrogation. But how widespread is involuntary confession in the post-Jon Burge era, and what's being done to address it?

The Netflix docu-series Making a Murderer, which tells the story of two men convicted of a 2005 rape and murder to which they later said one of them was coerced into confessing, has brought not only this case but the issues surrounding it into a prime-time spotlight.

Steven Avery and his mentally challenged nephew, Brendan Dassey, were convicted of the rape and murder of Teresa Halbach after Dassey, then 16, confessed. The Northwestern University Center on Wrongful Convictions of Youth took up the case and has followed it through a Wisconsin appellate court denial of appeal and the state's supreme court's refusal to hear it.

The case is now pending in federal court, with this most recent appeal based on constitutional issues that include whether the interrogation tactics used against Dassey resulted in what amounted to an involuntary confession. (Downers Grove lawyer Kathleen Zellner now represents Avery.) And that issue of involuntary confessions - obtained not through Jon Burge-like physical torture but what some view as coercive psychological techniques - is the subject of ongoing debate, along with some areas of agreement, among defense



attorneys and prosecutors.

Are things getting better?

The Center on Wrongful Convictions of Youth ("Center") focuses on juveniles who in some cases say they have falsely confessed to crimes, although the same principles and situations apply to adults, particularly those with cognitive deficiencies, says Megan Crane, Center co-director.

"Youth and intellectually disabled people, and otherwise vulnerable populations, are at greater risk" of falsely confessing, she says. "But it's inherently likely that anyone is vulnerable to falsely confessing, given the techniques that are commonly used on a day-to-day basis. Our position...is that the interrogation techniques that the criminal justice system has adopted, and that courts sign off on, are psychologically coercive. Their whole goal is to break down the person in that room until they accept that the only way to get out of that room is to plead guilty."

Prosecutors believe that the techniques Crane references are not used as often as defense attorneys say, and that their use has declined significantly in the past two or three decades - although that's not necessarily reflected in the cases reopened at the behest of organizations like Northwestern's Center, many of which date back that far, says Kris Hamann, executive director of the New York-based Prosecutors Center for Excellence.

"Prosecutors know it can happen, and we don't want to base our cases on false confessions," she says. "We need to be mindful it can happen. We've become more sensitive." She agrees that young people and certain other populations are more vulnerable. "And vulnerable people may be more susceptible to coercion," she says.

But, Hamann adds, "I do think there's a distinction in terms of time. There may have been techniques used 20, 30 years ago, that come up in wrongful convictions, that would not be the way we would recommend doing interrogations. I'm sure we have evolved since then." Most of the false confession cases that have been uncovered recently occurred decades ago, she says. "The bad conduct was a long time ago. That's often lost."

Human lie detectors

The techniques that Northwestern's Center sees in its cases start with a behavioral analysis interview, Crane says. "Detectives are trained to believe they can act as a human lie detector," she says. "They are trained to observe behavioral cues and word choices made by the suspect, and they believe they can use the cues to 100 percent determine whether the person is being truthful or deceptive."

Research has shown such cues are a "crapshoot," Crane says, but detectives continue to use them, although not because they want to obtain false confessions. "Detectives want to get the truth. But they're trained to believe this works, that this gets at the truth," she says. The "human lie detector" training is particularly inaccurate when it comes to youth because alleged signs of guilt include behaviors like slouching, not making eye contact, or having one's arms crossed, which are "very stereotypically teenage behaviors," she adds.



Megan Crane



Kristine Hamann

Hamann says she has never heard of detectives being trained to think they are human lie detectors. "I don't think anybody thinks they can be a human lie detector," she says. "That's not to say detectives are not given strategies on how to get someone to talk. The fundamental thing to think about is that when you are interrogating someone, it's not a normal conversation. You're going into a situation where somebody is not exactly inclined to tell you what happened."

When detectives believe they know someone is guilty, their next move is to do whatever they can to get a confession, Crane says. "The entire purpose is to get them to confess," she says. "They isolate the suspect in a small room and make them feel surrounded. They enter the room and immediately accuse them of the crime. They bring a pile of papers, slam that down on the table and say, 'We know you did this. We have test results showing your DNA on the gun, in this folder of papers.' More often than not, in cases of false confession, that evidence doesn't exist."

An innocent defendant might deny their guilt 100 times, but "that has no effect on the interrogator except to increase their resistance," she adds. "An innocent suspect will come into an interrogation room with 110 percent confidence. The whole goal is to bring that confidence down to rock bottom."

Confession contamination

During the interrogation, detectives who use these techniques ask questions that contain within them details about the crime that only the criminal would know, Crane says.

"Once they get their admission, from a person who knows nothing about the facts of the crime, it allows them to provide a fairly detailed confession," she says. "For a confession to be believable to fact-finders, the gold standard is that it contains details of the crime not previously known to the public.... Once enough leading questions add up, over a 5- or 10- or 20-hour interrogation, the suspect has given enough facts to add up to a confession."

Crane cites the case of a 13-year-old boy in California identified as Elias V who won an appeal last year after being accused of a lewd act on a child (237 Cal. App. 4th 568 (2015)). Three detectives with guns in their holsters brought him into a small room and immediately started accusing him of the crime, she says. In what was only a 20-minute interrogation - far shorter than many of them - they asked him enough leading questions to create the impression he was guilty, Crane says.

"We did a line by line analysis [of the transcript] and not a single inculpatory fact originated with the kid," she says, noting that the Center was amicus in the case, not counsel, although they joined in the oral argument and the chief judge ultimately invited Crane to make the argument because he had specific questions for her. "It was a beautiful opinion that came out from the appellate court, with a big focus on how suggestible kids are.... Because we're allowing this contamination to happen, we'll never know whether the confession was true or false. It destroys the integrity of the entire process."

Detectives must be trained to take statements appropriately, Hamann says, although she does not agree that they usually are trained to feed suspects information about the case. "I've certainly seen horrible examples in the past of where those things could have happened," she says. And while Crane and the Center could certainly point to such an example in the present day, Hamann adds, "I don't know that that was a standard practice [even in the past], and I certainly believe we now have a much better understanding of how to do an interrogation that holds water."

Sometimes interrogators use a carrot and not a stick, Crane says. To ultimately get a confession, especially from suspects who are resistant, detectives offer an alternative scenario to help make it more tolerable for the person to provide an admission. Sometimes it can be a threat, while in other cases, they go the other direction and offer a degree of empathy and promises of help, she says.

For example, a youth accused of lewd acts with a young child might be told, "Your hormones are acting up, it probably just

happened for a second, we can help you, I can talk to the judge about that, and we'll get you the help you need," Crane says. "Often that's the final nail in the coffin that gets the person to confess - promises of help, combined with the suggestion that you desperately need help."

Because confessions must be voluntary to hold up in court, Hamann says that threats that override a suspect's free will may cause the statement to be suppressed. For example, she says, "If someone says, 'You tell me what happened, or you're going to get the death penalty,' that's not voluntary."

The power of recording

Perhaps the key recommendation the Center would put forth to try to end false confessions is to video-record all of them, which is required to at least some extent in Illinois and 25 other states and "should be in all of them," Crane says. "It's a simple, low-cost solution that benefits the state and the defense."

Prosecutors and police are increasingly embracing this trend, Hamann says. "As soon as you decide you want to start interrogating someone, you record the whole thing," she says. "That way, everybody can see what was said by the detective and suspect, and you go from there. That way, you have facts and evidence.... The beauty of video recording is that you can see exactly what's been done, and you can assess it. That's why prosecutors and law enforcement have come around to thinking it's a good thing."

Such videos can even be a learning experience, she adds. "You can look at a detective and say, 'Maybe that's not the best way to ask questions.'"

But not all detectives record the entire interrogation, Crane says. Some capture just the confession itself, which limits the recording's usefulness. "Obviously, what you need to actually understand what's happened and whether it's a reliable and voluntary confession is the entirety," Crane says.

Hamann says prosecutors agree with recording the entire interrogation. "The protocols I've worked on say, 'You turn it on as soon as you walk into the room, even if you don't read the *Miranda* warning for awhile,'" she says.

In Illinois, 725 ILCS 5/103-2.1 provides that an interrogation of a homicide suspect is presumptively inadmissible if it is not recorded, either via audio recording or video recording. The prosecution can overcome this presumption by showing, by a preponderance of the evidence, that "the statement was voluntarily given and is reliable, based on the totality of the circumstances." 725 ILCS 5/103-2.1(f). ([See sidebar for resources elaborating on this standard.](#))

That standard applies not only to the confession but also the "entire custodial interrogation," notes Matt Jones, associate director of the Illinois State's Attorney Appellate Prosecutor Office in Peoria. The Center recommends this requirement be applied to all suspects in Illinois - most especially for juveniles - and that unrecorded statements be inadmissible, period, end of story, Crane says.

Crane notes that Illinois is continuing to make progress. By June of 2016, law enforcement will be required to record interrogations of suspects of eight enumerated felonies, including aggravated criminal sexual assault, aggravated battery with a gun, and armed robbery, she says.

Addressing coercive interrogation techniques

The Center also would recommend reforms to interrogation techniques. The "human lie detectors" approach should be scrapped entirely, Crane says. Interrogations should also be time-limited and held only at certain times of the day - the

Center has come across cases in which they happened in the middle of the night, after the suspect had been kept awake for 24 or 48 hours, she says.

By and large, Illinois has not made reforms in regulations of interrogation techniques to prevent coerced false confessions, with the exception of the progress in videorecording and the fact that for juveniles under age 13, "the juvenile must be given the right to talk to an attorney before interrogation," Crane says. She notes, however, that the right is limited to juveniles charged with crimes like homicide and sex offenses. "We recommend that this right [to counsel] be expanded to all crimes, and to juveniles over 13."

"Illinois has a long way to go in terms of adapting its interrogation techniques to prevent involuntary and unreliable confessions," Crane adds. "But Illinois is not alone; this is a nationwide problem, and Illinois handles confessions the same way as the majority of other states."

"There is essentially no meaningful regulation of interrogation techniques in Illinois," says Northwestern law professor and former Center director Steve Drizin. "Police officers receive minimal training about interrogations at the police academy and receive additional in-house and other training as they advance through the ranks on an as needed basis."

"The only regulation occurs through the courts which, on occasion, will suppress confessions in cases where judges believe police officers crossed the line into an unacceptable level of coercion. It is rare that courts will suppress confessions in cases in which suspects have knowingly and intelligently waived their Miranda warnings," Drizin says.

Courts should be more uniform about tossing confessions with obvious contamination of questions, Crane says. "We're seeing a slow movement of that, in mid-level state appellate courts," she says.

Expert testimony on coercive interrogation

Juries should be allowed to hear from expert witnesses who can explain how interrogators break down their suspects with the techniques they use, says Crane. "You need an expert on the stand to explain the effect of each," she says.

Prosecutors generally oppose the use of such experts as being mostly a defense tactic, Hamann says. "There's a debate about whether that's something [the techniques used] the jury could decide on their own," she says. "If you're a defense attorney, you want to get your client off. If you have a confession, what are you going to do? That's good lawyering on behalf of the defense attorney. The prosecutor is going to try to keep it out, on the theory that it's not relevant to the case."

Experts on false confessions and interrogation techniques are not prevented from testifying across the board in Illinois, as they are in states like Michigan, "but that does not mean [such testimony] is not precluded or limited on a case by case basis," Crane says. Jones says that experts are certainly allowed, "and it often comes up in the context of motions to bar a confession as coerced."

However, "[i]n Cook County and Lake County, the two Illinois counties with the highest numbers of documented false confessions, judges have routinely excluded false confession/interrogation experts from testifying," Drizin says. "I don't sense that the ice is slowly melting in this regard, but I may be wrong."

Confessions should be corroborated

Finally, confessions themselves should not be such a gold standard toward winning guilty verdicts, Crane says. In other countries, such as England, confessions always require corroborative evidence, either an eyewitness or "ideally" physical evidence such as DNA, she says.

Hamann agrees with that point. "As in all things, you have to compare what the suspect says to the evidence you have," she says.

"I'm not saying there's no mistakes. There's always going to be mistakes in this world. But the egregious conduct people talk about tends to be from 20, 30, 40 years ago.... We're all trying really hard to get this right and do it better. It's complicated."

The experience of the Center has been that like most people, Illinois judges and prosecutors tend to believe someone is telling the truth when they confess to a crime, Crane says. "Why else would a person confess, especially to a serious crime with very serious consequences for conviction?" she says.

"But minds sometimes can be changed if defense attorneys effectively litigate the issue, and lay out in painstaking detail all the reasons the confession does not make sense, was not corroborated by the other evidence, was contaminated by police, and potentially coerced by the police."

For their part, prosecutors are increasingly mindful of the research into errors in both confessions and eyewitness identifications, "so they take greater care to bolster these pieces of evidence with additional [corroboration]," Jones says.

Crane hopes that the *Making a Murderer* case and the Netflix series helps to chip away at reforms. "It's been amazing to see the public's response to it," she says. "They really crafted that narrative and that episode in such a way as to make the falsity of the confession and the dynamic at play apparent on the surface."

"We are in the process of studying the juvenile interrogation policies of every police and sheriff's department in Illinois," she says, noting that the Center sent Freedom of Information Act requests to every law enforcement department last year and is currently analyzing the results. "We plan to release a policy report this summer that will identify the problems and make specific recommendations for improvements of interrogation tactics," she says.



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RESOURCES >>

For a good overview of Illinois law related to the recording of police interrogation, and a free podcast on the subject, visit <http://illinoiscaselaw.com/police-interrogation-in-murder-case/>.

For a recent study that links sleep deprivation to false confessions, which was published in the *Proceedings of the National Academy of Sciences*, visit <http://www.pnas.org/content/113/8/2047.abstract>.

For more information on Northwestern Pritzker School of Law's Center on Wrongful Convictions of Youth, visit <http://www.law.northwestern.edu/legalclinic/wrongfulconvictionsyouth/>.

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